FILE COPY

No. 171

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

OKLAHOMA GAS & ELECTRIC COMPANY,
A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

CITATIONS

484418—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on March 23, 1942, affirming a judgment of the United States District Court for the Western District of Oklahoma.

OPINIONS BELOW

The opinion of the District Court (R. 19–28) is reported in 37 F. Supp. 347. The opinion of the Circuit Court of Appeals (R. 33–40) is reported in 127 F. (2d) 349.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered March 23, 1942

(R. 41). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Acts of February 15, 1901, 31 Stat. 790, 43 U. S. C. § 959, and March 4, 1911, 36 Stat. 1253, 43 U. S. C. § 961, permitting private interests to acquire rights-of-way for telephone, telegraph, and power purposes "within or through any * * * Indian or any other reservation only upon approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest" are applicable to trust allotments within an Indian reservation.

2. Whether the United States may compel a power company, which has not applied for nor obtained a license or easement under the foregoing statutes, to remove its transmission lines and poles from those portions of a public highway which the State of Oklahoma constructed across an Indian trust allotment pursuant to Section 4 of the Act of March 3, 1901, 31 Stat. 1084, 25 U. S. C. § 311.

STATUTES INVOLVED

The Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. § 959; Sections 3 and 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. §§ 319, 357, and 311; the Act of March 4,

1911, c. 238, 36 Stat. 1253, 43 U. S. C. § 961; and pertinent sections of other statutes granting special rights-of-way across Indian lands, are printed in chronological order in the Appendix, *infra*, pp. 11–17.

STATEMENT

On July 9, 1926, the State of Oklahoma, through its highway commission, requested the Secretary of the Interior of the United States "to grant permission in accordance with section 4 of the act of March 3, 1901 (31 Stats. L., 1058, 1084), to open and establish a public highway," eighty feet in width, across certain lands within the Kickapoo Indian Reservation, including trust allotment 193 which was patented in 1894 to She-pah-tho-quah, a Mexican Kickapoo, and which is still held in trust by the United States for her heirs (R. 13, 15, 28).[1] On January 20, 1928, damages in the sum of $1,275.00 having been paid to the United States for the heirs of She-pah-tho-quah, the Assistant Secretary of the Interior approved the map of definite location which accompanied the state's highway application (R. 15, 28).

On October 9, 1936, the State Highway Commission of Oklahoma granted to the Oklahoma Gas &

[1] The Kickapoo Indian Reservation in Oklahoma was established in 1883 by executive order. 1 Kappler, Indian Laws and Treaties (2d ed.) 844. The tribe and the United States subsequently agreed that the lands within the reservation should be allotted in severalty. Act of March 3, 1893, c. 203, 27 Stat. 557. See *United States* v. *Reily*, 290 U. S. 33, 36.

Electric Company, an interstate public utility, a license "to erect, construct and maintain a 4,000-volt electric line along, upon or across" certain highways in Oklahoma, including the segment of highway which crosses the allotment in question, "for the purpose of transmitting, selling and using electricity" (R. 16, 17, 28). The license states that it is revocable at will and that it "is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property" (R. 18, 28).

Pursuant to this license from the State Highway Commission, and without requesting a permit or easement of any kind from the Secretary of the Interior, the Oklahoma Gas & Electric Company proceeded to erect, and has since maintained, eight poles along that portion of the highway which diagonally traverses allotment 193 (R. 11, 16, 28). The Company having repeatedly refused to apply to the Secretary of the Interior for a permit under the Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. § 959, or for an easement under the Act of March 4, 1911, c. 238, 36 Stat. 1253, 43 U. S. C. § 961,[1] the Secretary of the Interior requested the

[1] There are at present on the statute books two parallel types of right-of-way statutes. Type 1 empowers the Secretary of the Interior "to permit the use" of public lands and reservations for telephone, telegraph, power, pipe line, canal and other rights-of-way. Act of February 15, 1901, 31 Stat. 790, 43 U. S. C. § 959; cf. Act of March 3, 1901, § 4, 31 Stat. 1084, 25 U. S. C. § 311. Type 2 authorizes the

Attorney General to institute appropriate legal proceedings to compel compliance.

This suit was accordingly brought on June 18, 1940, for the purpose of obtaining an authoritative interpretation of these several right-of-way statutes. In its complaint the Government sought a declaratory adjudication that respondent's power line across allotment 193, erected without prior compliance with the federal statutes relating to the construction of power lines across Indian lands, constituted a use of federally owned property not included in the highway permit acquired by the

---

Secretary "to grant an easement" for like purposes. Act of March 3, 1901, § 3, 31 Stat. 1083, 25 U. S. C. § 319; Act of March 11, 1904, 33 Stat. 65, 25 U. S. C. § 321; Act of March 4, 1911, 36 Stat. 1253, 43 U. S. C. § 961. Under type 1 the applicant obtains a revocable permit. *Swendig* v. *Washington Co.*, 265 U. S. 322 (1924); *United States* v. *Colorado Power Co.*, 240 Fed. 217 (Colo. 1916). Under type 2 the grantee acquires an actual interest in land, an easement of definite duration. 30 Op. A. G. 387 (1915).

Although the Acts of February 15, 1901, and March 4, 1911, both provide for power rights-of-way, neither supersedes the other. Under the earlier Act a power company obtains a *permit* revocable by the Secretary at any time; under the later Act it acquires a 50-year *easement* revocable only for nonuse or abandonment. See 40 L. E. 30 (1911); 41 L. D. 454, 455 (1913); 29 Op. A. G. 303, 311 (1912); H. Rept. No. 2177, 66th Cong., 3d sess. (1911) (Ser. No. 5848). A company may apply for a right-of-way under either Act.

The Acts of 1901 and 1911, insofar as they provide for power rights-of-way across Indian lands, were not repealed by the Federal Water Power Act of June 10, 1920, c. 285, 41 Stat. 1063, and continue to be administered by the Department of the Interior. 51 L. D. 41, 42 (1925).

State of Oklahoma in 1928 (R. 2-6). The Government asked that the poles and lines be removed and that damages computed at $5.00 for each of the eight poles be assessed against the defendant (R. 6).

In its answer respondent asserted that the State of Oklahoma acquired a highway "easement" across the allotment in question in 1928, and contended that the United States no longer had any jurisdiction, authority or control over the said "easement" (R. 6-9).

The District Court denied the relief sought, holding that the nature and incidents of the highway grant or easement acquired by the State across the allotment in question pursuant to the Act of March 3, 1901, are to be determined by the laws of Oklahoma, and that the maintenance of electric transmission lines on public highways in that state does not constitute an additional servitude for which the owners of abutting property are entitled to compensation (R. 19-28). The Circuit Court of Appeals affirmed, but on entirely different grounds. It held that the interpretation and construction of the 1901 Act is a federal question to be determined without reference to "state notions of its meaning and purpose" (R. 35). But, after examining numerous right-of-way statutes, it concluded that an Indian trust allotment is not a "reservation" within the meaning of the special acts of February 15, 1901, and March 4, 1911, dealing with electric transmission lines, that these special statutes are there-

fore inapplicable, that the grant of permission to establish a "public highway" under the Act of March 3, 1901, was broad enough to sanction the use thereof for power lines, and that respondent could not be required to comply with the conditions prescribed by Congress in the special acts governing the granting of rights-of-way for power purposes (R. 35–40).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that a trust allotment is not a "reservation" within the meaning of the Acts of Congress permitting private interests to acquire rights-of-way for telephone, telegraph, power, and other purposes "within or through any • • • Indian, or any other reservation only upon approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest."

2. The Circuit Court of Appeals erred in holding that a state which has been permitted to establish a public highway across Indian trust allotments under Section 4 of the Act of March 3, 1901, may in turn permit a power company to maintain its transmission lines and poles along those portions of the highway in contravention of express conditions imposed by Congress in special statutes governing the acquisition of rights-of-way for power purposes across Indian reservations.

REASONS FOR GRANTING THE WRIT

1. In holding that a trust allotment is not a "reservation" within the meaning of Acts of February 15, 1901, and March 4, 1911, the court below ignored a contrary administrative interpretation consistently followed for 35 years. Ever since 1907, the Department of the Interior has ruled that the phrase "Indian, or * * * other reservation," as used in the various right-of-way statutes, includes individual trust allotments within an Indian reservation. *Fresnol Water-Right Canal,* 35 L. D. 550, 551 (1907); *Instructions—Applications for Power Permits within Indian Reservations,* 42 L. D. 419, 420 (1913); *West Okanogan Valley Irrigation District,* 45 L. D. 563, 565–567 (1916). And this Court, in construing comparable language making it a federal offense for an Indian to commit certain crimes "within the limits of any Indian reservation," has likewise held that trust allotments are reservations. *United States* v. *Celestine,* 215 U. S. 278, 284–286.

2. Since trust allotment 193 is a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, providing for power rights-of-way "within or through any * * * Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest," the condi-

tions imposed in those Acts should have been given effect. These particular statutes deal specifically with rights-of-way for power purposes; they therefore supersede contemporaneous and prior right-of-way statutes of a more general character. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 405–406, affirming 209 Fed. 554, 560–561 (C. C. A. 8). In that case this Court and the Circuit Court of Appeals both agreed that an 1896 Act dealing specifically with power sites and rights-of-way superseded *pro tanto* a more general statute enacted in 1866.

The mere fact that in 1928 the Secretary of the Interior granted "permission" to the State of Oklahoma to establish a "public highway" eighty feet in width across a trust allotment does not mean that the state may in turn license the use of that highway for telephone, telegraph, power, pipe line, canal, railway, and other purposes covered by specific federal statutes. The fee title to that strip of land is still in the United States and that strip is still a "reservation" as that word is used in the general land laws. *United States* v. *Soldana*, 246 U. S. 530; *Ex parte Konaha*, 43 F. Supp. 747 (E. D. Wis.); *United States* v. *Celestine*, 215 U. S. 278, 285.

If the decision below is allowed to stand, it will mean that a mere grant of an easement for highway purposes under Section 4 of the Act of March 3, 1901, will carry with it the right to construct

pipe lines, telegraph and telephone lines, power lines, etc., and that private companies will be able to operate within and across Indian lands without first complying with the specific conditions prescribed by Congress for each of these particular types of rights-of-way. In short, the specific requirements laid down by Congress that power lines shall be constructed across Indian reservations only with the consent of the Secretary of the Interior and upon a finding by him that "the same is not incompatible with the public interest" will be nullified in those cases where the state authorities decide to permit such structures to be placed on public highways previously constructed across such reservations.

3. The questions thus raised are of great importance to the proper administration by the Department of the Interior of the numerous right-of-way statutes. Indian reservations, partially allotted in severalty under trust patents effective until 1956, exist in 22 public land states. Approximately 3,000 miles of state highways have heretofore been constructed across these reservations, and some 400 miles of telephone, telegraph, power and pipe lines have been placed along these highways by public utilities which, pending the outcome of the present case, have refused to comply with the conditions imposed by Congress in the special right-of-way statutes. Furthermore, if the decision is allowed to stand—that a trust allotment is not a "reserva-

tion" within the meaning of the 1901 and 1911 Acts—it will follow that there is no administrative procedure by which the construction of power lines across trust allotments outside of highway rights-of-way may be authorized.

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JUNE 1942.

APPENDIX

Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. § 959:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted.

hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Sections 3 and 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. §§ 319, 357, 311:

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in sev-

eralty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided,* That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so con-

strued as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. § 321:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any

individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided,* That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five

dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided,* That the rights herein granted shall not extend beyond a period of twenty years: *Provided further,* That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this Act is expressly reserved."

Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253, 43 U. S. C. § 961:

* * * * *

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the

issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

U. S. GOVERNMENT PRINTING OFFICE: 1942